Supreme Court, U. S.
FILED
MAR 15 1977
MICHAEL RODAK, JR., CLERK

No. 76-911

In the Supreme Court of the United States

OCTOBER TERM, 1976

ADAMO WRECKING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

EDMUND B. CLARK,
JOHN J. ZIMMERMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 545 F. 2d 1. The opinion of the district court (Pet. App. A12-A47) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1976. Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to December 31, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the special judicial review provisions of Section 307(b) of the Clean Air Act bar a defendant in a criminal

enforcement action from challenging the emission standard he is charged with violating.

STATUTE INVOLVED

Section 307(b) of the Clean Air Act, as added, 84 Stat. 1708, 42 U.S.C. 1857h-5(b), provides in pertinent part:

> (1) A petition for review of action of the Administrator in promulgating * * * any emission standard under section 112, * * * may be filed only in the United States Court of Appeals for the District of Columbia. * * * Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

STATEMENT

1. To carry out his duties under Section 112 of the Clean Air Act, as added, 42 U.S.C. 1857c-7, to protect the public health from hazardous air pollutants, the Administrator of the Environmental Protection Agency declared asbestos to be a "hazardous air pollutant" and promulgated emissions standards regulating the emissions of asbestos caused by a broad range of activities. See 40 C.F.R. 61.20-61.24, 38 Fed. Reg. 8829-8830.

One portion of these regulations established an emission standard applicable to the demolition of buildings and structures containing boilers, pipes, or structural members insulated or fireproofed with friable asbestos material. In addition to specific prior notification requirements, this emission standard provided (40 C.F.R. 61.22(d) (1973)):

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> (2) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:
>
> (i) Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building, structure, facility, or installation subject to this paragraph before wrecking of load-supporting structural members is commenced. The friable asbestos debris shall be wetted adequately to insure that such debris remains wet during all stages of demolition and related handling operations.

Although this emission standard could have been challenged in the United States Court of Appeals for the District of Columbia Circuit if the judicial review procedures specified in Section 307(b) of the Act had been properly invoked, this was not done. A petition for review filed by Dore Wrecking Company, in which the National Association of Demolition Contractors intervened, was dismissed by that court as untimely. *Dore Wrecking Co.* v. *Fri*, C.A. D.C., No. 73-1686, decided August 1, 1973.

2. One count of a two count superseding indictment returned in February 1975 in the United States District Court for the Eastern District of Michigan charged that petitioner:

> did knowingly cause the emission of asbestos from a four and one-half story commercial masonry building at the aforementioned location by failing to wet and remove firable [*sic*] asbestos material, used to insulate and fireproof a boiler in the basement of said building, before demolition of the load-supporting structural supports had begun: in violation of Title 42, United States Code, Section 1857c-7(c)(1)(B), and the

rules and regulations promulgated thereto, 38 F.R. 8829 (April 6, 1973), 40 C.F.R. §61.22(d)(2)(i).

Petitioner moved to dismiss this count, arguing that the regulation was invalid because Section 112 permits the Administrator to set only a numerical limit of permissible emissions, not to establish the "work practice" rules that had been promulgated. The United States supported the regulation on the merits and argued, as well, that Section 307(b) of the Act foreclosed petitioner's challenge to the validity of the emission standard.

The district court dismissed this count of the indictment, holding that Section 112 did not authorize the "work practice" standard (Pet. App. A34-A44). Responding to the contention that Section 307(b) barred the court from deciding the case on that basis, the district court characterized Section 307(b) as "highly ambiguous" and chose "to resolve doubts in favor of jurisdiction" (*id.* at A33).

The court of appeals reversed. The court discerned nothing vague or ambiguous in Section 307(b). The legislative history of Section 307(b) demonstrated that review had been placed in the District of Columbia Circuit to ensure "even and consistent national application" of the standards, and that the 30-day time limit for seeking review was designed "to maintain the integrity of the time sequences provided throughout the Act" (Pet. App. A10). The court pointed out that petitioner could have challenged the emission standard through the Section 307(b) procedure had it chosen to do so (*ibid.*). Therefore, the court concluded, petitioner could not challenge the standard in this criminal case.[1]

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[1]Although the court of appeals did not pass upon the validity of the emission standard, it observed (Pet. App. A9 n. 2) that it saw:

> nothing inconsistent with the purposes of this statute in the Administrator's promulgation of a "work practice" as a condition of an emission standard which, absent fulfillment of the work practice conditions, otherwise prohibits any emission of particulate asbestos material into the ambient air.

ARGUMENT

The decision of the court of appeals is correct. This is the first appellate decision to pass upon the extent to which a defendant in a criminal case may attack the emission regulation he is alleged to have violated. Consequently, there is no conflict among the courts of appeals on the question presented here.[2] Although the question is potentially important, and might warrant review if a conflict were to arise, there is no reason for review of this decision.

In *Union Electric Co* v. *Environmental Protection Agency*, 427 U.S. 246, the Court held that (427 U.S. at 253; emphasis added):

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[2]The question presented in this case is before the Fifth Circuit in a similar criminal enforcement action, *United States* v. *Big Chief, Inc.*, No. 76-3419. Petitioner's challenge to the "work practice" nature of the emission standard has been raised, belatedly, in petitions to review amendments to other portions of the asbestos emission standard for the demolition industry. *National Association of Demolition Contractors* v. *Train*, C.A. D.C., Nos. 74-1545 and 75-2078. The Administrator has argued in response to the petitions for review that the question cannot now be raised, because the time provided by Section 307(b) has lapsed and no grounds for the belated challenge have been offered.

In other contexts, courts of appeals have applied the requirements of Section 307(b) strictly, rejecting challenges that were not made at the right time or in the right court. See, *e.g.*, *Lubrizol Corp.* v. *Train*, C.A. 6, No. 76-1618, decided November 30, 1976; *Oljato Chapter of the Navajo Tribe* v. *Train*, 515 F. 2d 654, 661 (C.A. D.C.); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 512 F. 2d 1351, 1354-1356 (C.A. D.C.); *Granite City Steel Co.* v. *Environmental Protection Agency*, 501 F. 2d 925, 926 (C.A. 7); *Anaconda Co.* v. *Ruckelshaus*, 482 F. 2d 1301, 1304-1305 (C.A. 10); *Getty Oil Co. (Eastern Operations)* v. *Ruckelshaus*, 467 F. 2d 349, 359 (C.A. 3), certiorari denied, 409 U.S. 1125. See also *Sun Enterprises, Ltd.* v. *Train*, 532 F. 2d 280, 287 (C.A. 2) (parallel provision under Federal Water Pollution Control Act).

> Section 307(b)(1) allows petitions for review to be filed in *an appropriate court of appeals more than 30 days after the Administrator's approval* of an implementation plan *only if* the petition is "based solely on grounds arising after such 30th day."[3]

The Court further held that any new "grounds" must be grounds that, if known by the Administrator before acting, would have made it an abuse of discretion to have issued the regulation or standard in question (427 U.S. at 256).

Petitioner, in its attack on the emission standard, meets none of Section 307(b)'s requirements. It raises the lack-of-statutory-authority argument out of time, in the wrong court, in an action for enforcement; it does not even contend that it presents new "grounds" that could not have been presented in the time Congress allotted. Litigation of the issue petitioner now raises in this criminal enforcement proceeding is barred by Congress' command in Section 307(b)(2) that:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

An exclusive and time-restricted review provision simply means that, once the time for challenge has passed, regulations become final and have the force of the statute itself. Nothing in such a procedure offends the Constitution. *Yakus* v. *United States*, 321 U.S. 414. *Yakus* is on all fours with the present case. The Court held in *Yakus* that price

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[3]Review of the Administrator's approval or promulgation of an implementation plan must be sought in the court of appeals "for the appropriate circuit" under Section 307(b). The 30-day time limit for petitioning and the restriction upon later review still apply.

control regulations may constitutionally be made the subject of an exclusive review proceeding, and that if the special review proceeding affords those affected "a reasonable opportunity to be heard" (321 U.S. at 433), Congress may bar a defendant in a criminal case from attacking regulations that could have been attacked in the special review proceeding.

In *Yakus*, as here, it was sufficient that petitioners had not followed the available avenue for review or established that the prescribed procedures would have been inadequate to protect their rights. Cf. *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977, slip op. 8-9 (courts must respect congressional decisions to confine judicial review to particular times and courts). Petitioner bypassed the review proceeding available under the Clean Air Act, and its neglect is not a sufficient reason to allow it to make its arguments belatedly in this criminal case.[4]

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[4]*Leedom* v. *Kyne*, 358 U.S. 184, does not support petitioner. *Leedom* interpreted the ambiguous requirement of a "final" order (29 U.S.C. 160(f)) in favor of prompt review. The Court concluded that to deny any review there would create a statutory right without a legal remedy. 358 U.S. at 190-191. There is a remedy specifically provided by Section 307(b)(1) in this case, however; petitioner is foreclosed from challenging the regulations by congressional design and its own neglect, not by any legislative ambiguity or inadvertence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

EDMUND B. CLARK,
JOHN J. ZIMMERMAN,
Attorneys.

MARCH 1977.

DOJ-1977-03